

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 3654 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE S.D.PANDIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

GULAMAHEMAD GULAMRASUL SHAIKH

Versus

STATE OF GUJARAT

Appearance:

MR EE SAIYED for Petitioners
MR H.F.MEHTA,APP for Respondent No. 1
MR JC SHETH for Respondent No. 2

CORAM : MR.JUSTICE S.D.PANDIT

Date of decision: 28/10/96

ORAL JUDGEMENT

Rule.

I have heard both the sides at length on merits, and, therefore, I proceed to dispose of this matter finally by this judgment.

2. This petition is filed under Section 482 of the Code of Criminal Procedure by the original accused in

Criminal Case No.1505 of 1996 on the file of Metropolitan Magistrate Court No.10, Ahmedabad to quash the order of issue of process against them for the offences punishable under Section 406, 420, 441 and 114 of the Indian Penal Code and to quash whole of the proceeding of Criminal Case No.1505 of 1996.

3. The respondent No.2 Mustufahusain Gulamrasul Shaikh has filed this Private Criminal Case No.1505 of 1996 against the present petitioners who are his real brothers. It is the case of the complainant that his father and mother have left behind certain properties consisting of movable as well as immovable. The said property consisted of a flour mill bearing name New Bharat Flour Mill factory and in the said property he has got equal share with each of the present petitioners. The said property is in possession of the present petitioners and the petitioners are not giving him any accounts or any money of his share and thereby they are misappropriating the income of the said property and as they are making use of the said property for their own benefit, they have committed the offence punishable under Sections 406, 420 and 441 of IPC. After recording the statement of the complainant on oath, the learned Metropolitan Magistrate was pleased to issue process against the present petitioners for the offences punishable under Sections 406, 420, 441 and 114 of the IPC. Therefore, the petitioners have come before this court and they are seeking the quashing of the said order of the issue of process as well as Criminal Case by contending that the said criminal proceeding is a clear abuse of process of law and the dispute between them and the original complainant is a civil dispute. Before filing present criminal case, the original complainant-respondent No.2 had issued a notice calling upon them to give his share and they replied the notice by contending that on account of the will executed by the father, he has been denied any property by his father and consequently he is not entitled to get any share, but inspite of the specific stand taken by them, instead of going to the Civil Court, the complainant has come to a Criminal Court, and thereby he is making abuse of process of law.

4. The respondent has filed his affidavit and he contended that when the trial court has issued an order of issue of process, this court should not interfere with the said order and that the petitioners should be directed to approach before the trial court to seek appropriate remedy under the law. It is contended that there is no justification for filing the present petition

and the present petition should be dismissed.

5. The petitioners have come before the court at the stage of passing of order of issue of process. At the stage of issuing process, it is not the duty of the court to find out as to whether the accused will be ultimately convicted or acquitted. The object of consideration of the merits of the case at this stage could only be to determine whether there are sufficient grounds to proceed further or not. If, however, the bare perusal of the complaint or the evidence in support of the same taken at their face value makes out absolutely no case against the accused or the complaint does not disclose the ingredients of the criminal proceeding which is alleged against the accused, the court can interfere with the order of issue of process by exercising the powers under Section 482 of the Code of Criminal Procedure. In the case of *Panjab National Bank v. Surendra Pratap Sinha*, A.I.R.1992 Supreme Court,1815 it has been held by the Appex Court that the judicial process should not be an instrument of oppression or needless harassment. The court should be circumspect and judicious in exercising discretion and should take all the relevant facts and circumstances into consideration before issuing process least it would be an instrument in the hands of private complainant as a vendetta to harass the person needlessly. The order of issue of process is a judicial order, and, therefore, it is incumbent upon the Magistrate to apply his mind before passing the order of issue of process. Mere mechanically passing of order by quoting a section quoted by the complainant in his complaint would not be justifying the order of issuing of process under Section 202 of Code of Criminal Procedure.

6. If the complaint of the complainant is read as a whole, then it would be quite clear that as per his own complaint, the complainant is the real brother of the present petitioners who are accused No.1 and 2 as per the title in the complaint. It is the case of the complainant himself in his complaint that the property consisting of flour mill and some movables were left behind by his parents and according to him, the said property is occupied and in possession of the present petitioners. It is also quite clear that before filing the present complaint, the complainant has issued a notice to the present petitioners and petitioners had replied the same by raising a contention that the father has executed a will and by the said will he has been disinherited. Now when the complainant was aware of all these things, his recourse to the criminal proceeding

cannot at all said to be justified. It must be remembered that there is no entrustment of any property by the complainant himself. The property in question has come in the hands of the present petitioners as per the averments made by the complainant in his complaint on account of the death of his parents. Similarly, there is also no question of the complainant himself delivering any of the property in the possession of the present petitioners. When there was no entrustment by the complainant himself and when there is no delivery of possession of any property by the complainant himself, his claim that the accused-petitioners are guilty of the offence punishable under Section 406, 420 and 441 is not at all tenable. Similarly when the co-owners-petitioners are denying him his share and enjoyment of property of his share which he is claiming, it could not be said that by such act, the petitioners-original accused have committed any criminal offence. The proper remedy for the present petitioners was to approach to the Civil Court for getting his share. As per his claim by effecting a partition by meats and bounds, in no case, his case in filing a criminal case could be accepted. The action of the respondent No.2 in lodging a case is a clear cut abuse of process of law. When there is a case of abuse of process of law, this court will exercise jurisdiction under Section 482 of the Code of Criminal Procedure to remove the injustice to the parties by quashing the proceeding.

7. At the cost of repetition, it must be said that the learned Metropolitan Magistrate has mechanically passed the order of issuing process. He has not at all applied his mind though he was passing a judicial order. The complainant is a Mahomedan and the accused-petitioners are his real brothers and in the complaint itself there is a clear case that there is dispute regarding partition and sharing the property left behind by parents. Certain averments are made in the complaint which pertains to claim of a Hindu by contending that the property is an ancestral property, there could not be any ancestral property in case of a Mahomedan. Had the learned Metropolitan Magistrate carefully read the averments made in the complaint and applied his mind to the said averments, then he would not have passed the order in question. The learned Metropolitan Magistrate has also not taken into consideration that for one and the same act, he could not issue of process for the offences punishable under Section 406 and 420 IPC. The offences punishable under Section 406 and 420 of IPC cannot go together. In an offence punishable under Section 406 of IPC, there must

be an entrustment of the property by the complainant to the accused and in case of Section 420 of IPC, there must be a delivery of the property by the complainant on account of some inducement or misrepresentation made by the accused to the complainant. The learned Metropolitan Magistrate ought to have considered all these legal aspects. It is experienced by this court that the Magistrates in the Trial Courts are not at all applying their minds before passing an order of issue of process which is a judicial order and they are mechanically and blindly quoting the sections quoted by the complainant and are abusing the orders of issue of process. Such conduct on part of the Magistrates could not be justified and it reflects against them.

8. Therefore, in view of the above discussion, I hold that the present petition will have to be allowed. The dispute between the parties is a clear civil dispute, the recourse taken by the respondent No.2 to the Criminal Court is not at all justified. It is a clear case of abuse of law. I, therefore, exercise powers under Section 482 of the Code of Criminal Procedure and quash the order of issue of process as well as the criminal proceeding and set aside them.

Rule is made absolute.

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